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No. 90-1314

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

MARVIN L. WARNER and DAVID J. SCHIEBEL,
Petitioners,

v.

STATE OF OHIO,
Respondent.

On Petition For Writ Of Certiorari To The
Supreme Court of the State of Ohio

BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTIONS PRESENTED

1. Should a state criminal case in which the trial court found from the totality of the surrounding facts that the defendant could receive a fair trial be used as a vehicle to review the practices of those federal courts which rely only upon voir dire to test the availability of an impartial jury?

2. Where a defendant claims error because he was not given copies of written instructions before they were handed to the jury, should the convictions be reversed despite the state court's finding that the written instructions were the same as oral instructions read in the presence of the defendants and that the defendants were not prejudiced by their failure to receive the written copies beforehand?

3. Where a state statute prescribes recklessness as the proper mens rea of an offense, must the State prove that the defendant acted knowingly and intentionally, despite the trial court's admonition prior to trial that such intent was not an element of the crime?

4. May a state criminalize the sale of securities by one who through the exercise of due diligence should know that he is making material misrepresentations to the buyer?

5. Where a jury finds that an accused acted with a purpose to deceive with respect to a course of conduct resulting in multiple securities offenses under state law, may an instruction that allegedly contains a presumption of knowledge be deemed harmless beyond a reasonable doubt based upon the state court's determination that a "purpose to deceive" necessarily implies actual knowledge?

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v.

STATE OF OHIO,
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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

OPINIONS BELOW

Respondent does not contest the statement of opinions below set forth in the Petition for Writ of Certiorari. For the convenience of the Court, citations to the opinions below will be to the text of those opinions reproduced in the appendix to the Petition for Writ of Certiorari.

JURISDICTION

Respondent does not contest petitioners' statement that they are seeking to invoke jurisdiction under 28 U.S.C. § 1257.

STATUTORY PROVISIONS

Respondent does not contest the recital of statutory provisions set forth in the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Home State Savings Bank collapsed in March 1985 because over $144 million of its assets illegally transferred to ESM Government Securities, Inc. were lost when ESM went bankrupt. ESM was unquestionably a fraud. In Home State it found an owner and officers willing to risk millions of dollars of other people's money, heedless of board resolutions and regulatory instructions specifically to the contrary. Just months before Home State's insolvency became public, its owner (petitioner Warner) and president (petitioner Schiebel) engineered the sale to an unwitting public of millions of dollars in worthless debentures.

1. *The Trial*

On December 13, 1985, petitioners Warner and Schiebel were each indicted by a state grand jury for forty-one counts of misapplication of funds, forty-one counts of unauthorized acts, and three counts of securities violations, all felonies under Ohio law. A co-defendant, Burton Bongard, — a predecessor of Schiebel as president — was indicted on all but the securities counts. Trial was initially scheduled for August 18, 1986 but was continued at the defendants' request until November 17, 1986 — some twenty months after Home State's collapse.[1]

With the depositors no longer anxious about their funds,

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[1] The failure of Home State led the Ohio Governor to briefly close the other privately-insured savings and loans. By the time of trial, those savings and loans had been re-opened for more than a year, without loss to depositors.

local interest abated. The defendants nonetheless requested a change of venue based upon media coverage attending Home State's collapse and the flawed results of two outdated surveys commissioned by Warner.[2] Having reviewed all of this material, the trial judge elected to withhold his ruling on venue until the conclusion of voir dire. The judge did, however, grant several defense requests regarding the procedures for jury selection. Most notably, each potential juror completed a specially prepared questionnaire and was individually questioned outside the presence of the other veniremen. At the conclusion of voir dire, the trial judge specifically found that a fair jury had been found within Hamilton County.[3]

After a three month trial and nine days of deliberations, the jury rendered a verdict which carefully delineated the defendants' culpability. Bongard was convicted of all eighty-two misapplication and unauthorized acts counts; Warner was convicted of six unauthorized acts counts pertaining to

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[2] What petitioners characterize as "professional opinion polls" were conducted for Warner by the "National Jury Project." In its book, *Jurywork: Systematic Techniques* ix (2d ed. 1984), that organization describes itself as "one of the few such organizations devoting its efforts to civil plaintiffs and criminal defendants," and gives "how-to" methodologies for arguing for a change of venue. An expert described Warner's surveys as "fatally flawed" and "scientifically invalid as accurate gauges of current public opinion concerning the defendants in this case." The more recent of the two surveys was seven months old when trial began.

[3] The Petition for Certiorari is replete with hyperbole, mischaracterizations, and matters not included in the record. Typical is the misleading remark that the trial "was filmed for television." (Pet., p. 4.) As in countless other cases, cameras were allowed in the courtroom subject to compliance with guidelines contained in state and local court rules, and trial excerpts were sometimes shown during local news broadcasts. Defendants never objected. Elsewhere, petitioners aver that Warner was acquitted of federal charges "based on the same conduct involved in this case." (Pet., p. 5.) To the contrary, all but two of the eighteen counts against Warner in the federal indictment involved conduct for which Ohio did not indict under any law. Furthermore, the federal charges were for conspiracy and wire fraud, not for unauthorized acts or securities violations. *United States v. Warner, et al.*, No. CR 1 86-0106 (U.S.D.C., S.D. Ohio).

transactions occurring after he became directly involved in transfers made to ESM; and both Warner and Schiebel were convicted of the three securities counts.[4] The trial court sentenced Warner to ten-and-a-half years imprisonment, seven of which were suspended. Schiebel was sentenced to eighteen months, with twelve months suspended.

2. *The Unauthorized Acts Offenses*

Home State was a state-chartered savings and loan association headquartered in Cincinnati, Ohio, and regulated by the Ohio Division of Savings and Loan Associations ("ODLSA") and the Ohio Deposit Guarantee Fund ("ODGF"), the private insurance fund to which Home State belonged. Beginning in the early 1980's, Home State lost millions of dollars from its traditional residential financing operations. To produce profits, Home State turned to ESM, a small, unregulated and thinly-capitalized government securities dealer in Fort Lauderdale, Florida. ESM and Home State developed a mutual dependence. Through unorthodox repurchase agreements ("repos"), Home State gave ESM the free use of securities valued in the millions, which ESM used as collateral for loans from other customers.[5] In exchange, ESM gave Home State a steady cash flow through rigged "day trades."

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[4] Bongard dismissed his appeal, and has completed his state prison term. The separately-indicted officers of ESM and a partner of Alexander Grant — the accounting firm which certified false ESM financials — pled guilty to numerous Ohio offenses months before the defendants' trial, and have also been imprisoned.

[5] Although repurchase transactions are couched in terms of a "purchase" and "sale" of securities, they are the equivalent of collateralized loans. In a repo, ESM borrowed a municipality's excess funds by selling it government securities, subject to a promise to later repurchase these securities at a price profitable to the municipality. On the other side, ESM simultaneously lent the municipality's funds on a short term basis by purchasing the government securities (which were being sold by ESM to the municipality) from an institution such as a bank or savings and loan, subject to ESM's promise to later resell the securities to the institution at a profit to ESM.

Perhaps more importantly, ESM maintained personal accounts through which petitioner Warner and his co-defendant Bongard received millions of dollars in similarly rigged transactions.

The fatal relationship between Home State and ESM began in 1980, when Home State first entered into a series of extremely large and irregular repurchase transactions with ESM labelled "leveraged arbitrages." The most dangerous irregularity in these repos was the exceedingly large amount of collateral Home State gave to ESM in relation to the amount Home State borrowed from ESM. According to industry standards, the accepted collaterization rate, i.e., the market value of collateral given in relation to the amount borrowed, for repurchase transactions is no more than 105% to 110%, depending on the type of security. Between 1980 and 1983 the collateralization rates for Home State's repos were as high as 239%. In return for this massive overcollateralization, ESM gave Home State profits derived from fictitious "day trades" to offset losses from Home State's normal lending operations. The ultimate price of this illicit cash flow, however, was enormous — overcollateralization was the equivalent of an interest-free, unsecured loan from Home State to ESM, creating a risk of massive loss for Home State should ESM not return the collateral.

The unprecedented financial risk created by Home State's transactions with ESM was the subject of regulatory comment and concern for several years preceding Home State's collapse. The ODSLA concluded that the income generated by these transactions did not justify the tremendous risk to Home State, its depositors, and the ODGF. The ODGF concurred in ODSLA's conclusions and, beginning in 1982, issued a series of written directives instructing Home State to reduce its involvement with ESM. On April 28, 1983, at the insistence of ODGF, the Home State board of directors passed a resolution expressly limiting the collateralization rates to 105% and 110%. This resolution was never modified or rescinded.

Warner admitted at trial that he received copies of the board reports. Although not a board member, he stayed in close contact with Home State's management, and little of consequence could be done without his blessing or knowledge. On April 13, 1983 — while ODGF's demand for the board resolution was pending — Warner personally authorized Home State's largest transaction with ESM — a $700 million leveraged arbitrage. The ODSLA and ODGF directives regarding collateralization levels were discussed at the meeting in which Warner gave his authorization. The board of directors — which thought Home State was *reducing* its involvement with ESM — never approved this massive transaction. Shortly after the leveraged arbitrage was in place, ESM began calling upon Home State to send additional funds in the guise of "margin calls."[6] The series of payments Home State made to ESM in 1983 were not legitimate margin calls, as they bore no rational relationship to the change in market value of Home State's securities pledged to ESM, and greatly exceeded the 105% and 110% limits of collateralization adopted by the board resolution.

Between May 1983 and October 1983, Home State made forty-one payments to ESM, each of which violated the April 1983 board resolution and created a greater risk of loss for Home State. Home State's unauthorized transfers to ESM during this period totalled $114 million, and constitute the lion's share of Home State's losses at the time of its collapse in March of 1985. The jury convicted Warner for the last six transfers (totalling $12 million), which took place after Warner had specifically assumed final responsibility for future Home State payments to ESM.

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[6] Margin calls are used by securities dealers and customers to adjust the collateralization rate in response to changes in the market value of collateral. For example, if the market value of the collateral declines, the dealer will call for additional funds from the customer to maintain the previous level of collateralization. However, if the market value of the collateral increases, the customer will make a margin call upon the dealer. Home State did not make margin calls on ESM.

Warner's personal account at ESM fared far better than Home State's. Warner's account was relatively inactive until Home State's involvement with ESM increased by hundreds of millions of dollars. Between 1980 and 1985, Warner was given approximately $9 million by ESM through fictitious "day trades," interest rate subsidies, rebates and the early close-out of his personal account. Upon learning in early 1985 that ESM was on the verge of collapse, Warner demanded that ESM cash out his personal account. Within a week, Warner received all of his funds from ESM, including a $385,990 gain. ESM closed the next month, unable to return Home State's collateral.

3. *The Securities Offenses*

In 1984, Warner and Schiebel engineered another scheme designed to keep Home State artificially afloat. Home State's parent company, Home State Financial, Inc. ("HSFI"), needed $29 million to retire debentures due to mature on October 31, 1984. HSFI lacked liquid assets, so it planned to simply issue new debentures. In January 1984 HSFI filed a 156-page S-2 registration statement to obtain the approval of the SEC.

The registration approval process — which was expected to last only 45 days — became an eight month ordeal of unrelenting questioning by the SEC about Home State's transactions with ESM. By late August, with only two months left before the debentures matured, SEC approval appeared hopeless. Warner and Schiebel therefore implemented an alternative plan — the merger of HSFI into Home State, thereby making Home State's deposits available to pay off the debenture debt. Home State could issue the new debentures without SEC scrutiny because, as a "bank," it would be exempt from the registration process.

Warner and Schiebel obtained a remarkably expedited approval of the merger from both the ODSLA and ODGF by

never mentioning to them the pending S-2 or the SEC's troublesome questions about Home State's ESM transactions. Following the merger, Home State proceeded to issue new debentures by use of a four page offering circular which incorporated by reference (but did not attach) HSFI's prior 10-K and 10-Q filings, which had been signed by Schiebel. The offering circular contained a general description of the debentures and two pages of unaudited financial statements. Neither Home State's attorneys nor its auditors ever issued an opinion on the circular's contents or the financial statements. Warner and Schiebel were actively involved in the preparation of the offering circular,[7] reviewing and revising it until it was mailed on Friday, September 28, 1984. Even though Home State had become a financial hostage to ESM, Warner and Schiebel omitted *any* reference to ESM in the circular.[8]

Home State's assets were grossly overvalued in the financial statements contained in the offering circular. Proper disclosure of one asset alone would have wiped out the reported net worth and revealed that Home State was insolvent. There were also blatant misrepresentations in the 10-K and 10-Q reports which were incorporated by reference into the offering circular. Warner and Schiebel participated in the sale of the debentures with full knowledge that the offering circular grossly distorted Home State's true financial condition. They worked together to set up the sales team, develop

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[7] Both petitioners are sophisticated businessmen with considerable experience in securities offerings and knowledge of disclosure requirements. Additionally, Warner has a masters of law degree, and Schiebel is a certified public accountant.

[8] ESM's financial troubles were emphasized to Warner and Schiebel at a meeting at Home State on September 26, 1984 — just two days before the offering circular was mailed. ESM's principals told Warner and Schiebel that it could not return Home State's collateral; it could not substitute collateral; it could not unwind the transactions; and, in short, ESM did not have the money. At the time of this meeting, petitioners had no idea where Home State's collateral, worth far in excess of the institution's net worth, was located.

leads, and direct the sales effort. Schiebel personally conducted training sessions and revised the training manual.

4. *The Jury Instructions and Verdict*

The State and petitioners submitted to the trial court exhaustive memoranda on proposed jury instructions. While discussing proposed jury instructions regarding the unauthorized acts counts during the week before trial, the trial court cautioned that, "I'm very reluctant to add something that is not contained in the statute as an element of a crime." (T.p. 102.) The trial judge then advised the parties that he believed the mens rea for unauthorized acts counts was different from that for misapplication counts. From that point forward, the defendants were on notice that the jury instructions on the unauthorized acts counts would not include the knowledge or intent mens rea of the misapplication counts. As the Ohio Supreme Court held, the charges given by the court accurately state the law of Ohio.

In its charging conference, the trial court spent a considerable amount of time explaining to counsel the instructions the court intended to give to the jury, but — in accordance with its usual practice — did not give written copies of the charge to the prosecution or defense in advance of closing argument. The trial court gave defense counsel a virtually unlimited opportunity to argue and ask questions about the proposed instructions.

After reading its written set of instructions to the jury, the trial court held a chambers conference with counsel to hear objections and requests for additional charges. Following this conference, in the presence of all defendants and counsel, the judge gave the jury four additional instructions. All but one of these supplemental instructions had been requested by the defense, and all were given without further objection. As the jury retired to deliberate late that afternoon, it was provided with a copy of the court's previously prepared written set of instructions.

Early the next morning, counsel for petitioner Warner — acting on behalf of all three defendants — met with an assistant special prosecutor and arranged to have the supplemental instructions typed. They were then brought to the trial judge who gave them to his constable for delivery to the jury room. No defendant objected to this procedure, nor was there any request that the jury be recalled for a formal presentation of the additional written instructions in open court.

The jury deliberated for nine days, then rendered a verdict reflecting a careful study of the evidence. Within the fourteen day limit imposed by Ohio rules, the defendants moved for a new trial or acquittal. All motions were denied, and the defendants were sentenced.

5. *The Post-Trial Proceedings*

Well after the time for filing new trial motions had passed, Warner's wife, an attorney, spent eight hours with Juror John Brady during two sessions at a local restaurant and "a couple hours" at the house of Juror Rita Lafkas, all supposedly as "trial preparation" for the upcoming federal case. (Both jurors had been previously contacted within fourteen days of the verdict by Warner's lawyers.) Having thus been courted by the wife of the man they voted to convict, the two agreed to sign affidavits attacking Juror Larry Dalton.[9] The defendants then filed the affidavits in support of requests for leave

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[9] Petitioners imply that Dalton lied his way onto the jury by concealing that his mother-in-law once had an account at Home State, yet *all* of the evidence — including the juror affidavits — establishes that Dalton was unaware of the account at the time of voir dire. The account had been effectively closed months before Home State collapsed, remaining technically open only because *twenty cents* in accrued interest was credited after all deposits had been withdrawn. Petitioners further proffered the affidavit of Juror Lafkas to say that Dalton told her he "hated" Marvin Warner. Dalton explained in an affidavit that he took to "needling and kidding" Lafkas during the three month trial, and made jesting remarks to "get a rise out of her," but not out of any dislike for Warner.

to file untimely new trial motions. The proposed motions for new trial were based upon the two juror affidavits, thus violating the Ohio evidence rule which forbids the use of juror testimony to attack verdicts. Ohio R. Evid. 606(B). The trial court denied the requests on the basis that they were untimely under Ohio law.

The defendants had appealed their convictions immediately after sentencing. They each filed a second appeal after their untimely new trial motions were refused. Each defendant's two appeals were at first consolidated by the court of appeals, so the defendants each filed just one brief relating to both of their appeals. In those briefs — filed almost fifteen months after the verdict — defendants for the first time alleged that the jury never received written copies of the supplemental instructions typed at their request on the first morning of deliberations. Before the State could investigate and respond, the court of appeals reversed its order of consolidation, stayed the conviction appeal (in which this "missing instruction" argument arose), and ordered the State to brief only the new trial issue.

After the stay of the conviction appeal was lifted, the State moved under Ohio App. R. 9(E) to correct the record as to the allegedly "missing" instructions. The trial court found as a matter of fact that the supplemental instructions had been delivered to the jury. The Ohio Supreme Court upheld that finding.

REASONS FOR DENYING THE WRIT

A unanimous Ohio Supreme Court affirmed petitioners' convictions after a careful review of a record containing 11,880 transcript pages, hundreds of trial exhibits, affidavits, and memoranda. The petitioners are now asking this Court to revisit that record, make new findings of fact, and establish unprecedented constitutional barriers to state prosecutions of illegal practices in the savings and loan industry. Despite the petitioners' inflated rhetoric, there is no legitimate constitutional reason for the Court to review this case.

The venue decision presents no constitutional question, as Ohio follows the venue standards and procedures mandated by this Court. Venue was determined only after the trial court made a factual finding that the defendants could get a fair trial without a change of venue. Thus, a review by this Court would consist of a reappraisal of the record to determine whether or not the trial court misread the atmosphere in Hamilton County on the eve of trial. The issues relating to jury instructions likewise depend upon the facts: whether or not supplemental instructions reached the jury, and whether or not the oral instructions varied from the written. Those findings of fact are then meaningful only through application of state law. Ohio's highest court found that the jury received the proper instructions — in fact, and as required by law.

To justify review of the securities counts, the Court must find a constitutional basis for denying Ohio the right to define what constitutes criminal conduct in the sale of securities and be willing to override the jury's findings as to the petitioners' mental state. To warrant review of the unauthorized acts counts, the Court would need to assume that the Ohio Supreme Court erroneously interpreted its prior decisions and Ohio's unauthorized acts statute, or else decide that a jury should be wrongly instructed in order to meet a defendant's unjustified hopes.

The petitioners were convicted because their conduct, not their trial, was unlawful. The unanimous Ohio Supreme

Court was unconvinced that squandering depositors' funds and selling worthless debentures are permitted conduct in Ohio, or that the jury and trial court misjudged the facts. Petitioners' convictions give rise to no constitutional issue.

1. The Ohio Courts Applied The Venue Test Set Forth By This Court In *Irvin* v. *Dowd*, And The "Totality Of The Surrounding Facts" Showed That The Defendants Could Receive A Fair Trial Without A Change Of Venue.

The jury in this case produced a verdict which could only result from a dispassionate study of the evidence. Unable to legitimately attack the jury's performance, petitioners urge certiorari to clarify a federal practice of "exclusive reliance upon voir dire" to resolve venue motions. (Pet., pp. 24, 26.) Whether or not the petitioners have accurately characterized the federal venue practice is academic, because Ohio relies upon "the totality of the surrounding facts" to assess fairness, as prescribed by this Court in *Irvin* v. *Dowd*, 366 U.S. 717, 721 (1961). (Pet. App. A, pp. 22-23.) The present case is the wrong vehicle through which to test the federal practice of "exclusive reliance on voir dire" cited by the petitioners.[10]

The totality of the surrounding facts reveals that defendants received a fair trial. The trial court had before it all of the newspaper clippings, media accounts, and privately-commissioned surveys submitted by the defendants. A review of those materials, however, did not in the court's opinion mandate a change of venue. Even the petitioners' exaggerated

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[10] If federal courts are applying incorrect standards, then the problem should not be addressed in a state case, where the federal standard may be inapplicable. The Court may choose to adopt a rule "[i]n exercise of [its] supervisory power to formulate and apply proper standards for enforcement of the criminal law in federal courts, and not as a matter of constitutional compulsion." *Murphy* v. *Florida*, 421 U.S. 794, 797 (1975), quoting *Marshall* v. *United States*, 360 U.S. 310, 313 (1959). In *Murphy*, for example, the Court refused to apply the more stringent federal standard of *Marshall* to state criminal proceedings.

depiction of the mood in Hamilton County does not indicate a "trial atmosphere . . . utterly corrupted by press coverage," so as to require a change of venue.[11] *Dobbert* v. *Florida*, 432 U.S. 282, 303 (1977). The trial court nevertheless granted the defendants a continuance — suggested in *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966), as one means of alleviating any potential for local prejudice — thus jury selection did not begin until eleven months after petitioners were indicted, and twenty months after the fall of Home State. "That time soothes and erases is a perfectly natural phenomenon, familiar to all." *Patton* v. *Yount*, 467 U.S. 1025, 1034 (1984).

Under these circumstances, the trial court correctly withheld ruling on the defendants' motion for change of venue until the conclusion of voir dire. Potential jurors filled out special questionnaires testing their background and knowledge of the case. Home State depositors, debentureholders, and their relatives were automatically disqualified, even though none of them had lost their funds.[12] Each venireman was then individually questioned outside the

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[11] Even at its height, the media coverage was factual and non-inflammatory. Much of the publicity focused upon the wrongdoings of ESM and Alexander Grant, whom the defendants publicly and at trial blamed for Home State's collapse. The petitioners are asking the Court to do what it refused to do in *Dobbert* — presume prejudice simply because the community was made aware of the charges against them.

[12] Petitioners also requested that depositors at all other ODGF-insured institutions be automatically disqualified as "victims." This Court has previously refused to categorically disqualify jurors for implied bias. *E.g.*, *Dennis* v. *United States*, 339 U.S. 162 (1950) (federal employees not automatically disqualified in "loyalty oath" case). No reported case has ever defined "victim" so broadly as to include depositors (or even shareholders) of an institution which was not the target of a defendant's crimes. The State could uncover only one instance where a defendant had even attempted such a bold argument. *United States* v. *Gleason*, 616 F.2d 2 (2d Cir. 1979), *cert. denied*, 444 U.S. 1082 (1980) (bank depositors not automatically disqualified from bank fraud prosecution). The circuit court characterized the defendants' argument as "so speculative as to border on the frivolous." *Id.* at 21.

presence of the others. The trial judge ultimately observed that "we have engaged in extensive and comprehensive voir dire over the last two weeks or more, subjecting some seventy jurors to one and a half to two and a quarter hours of questioning, sometimes resembling a rigorous cross-examination rather than voir dire" and expressly found that "the passage of time has reduced the effect of pretrial publicity" and that a fair and impartial panel had been found within Hamilton County. (T.p. 2850-51; Pet. App. A, pp. 24-25.) That finding should be accorded "special deference." *Patton* v. *Yount*, 467 U.S. at 1036-37. Three Ohio courts found the jury to be fair, and the petitioners can point to nothing from the record to prove otherwise.

Petitioners instead resort to irrelevancies and innuendo, none of which bears upon the issue they want reviewed. They refer to Warner's acquittal of federal wire fraud charges in Michigan, ignoring that the Ohio jury convicted on charges having no counterpart in the federal trial (unauthorized acts and securities violations).[13] They then launch an unjustified attack on two of the jurors.

Petitioners impugn Juror Beth Statt because her account at an ODGF thrift was briefly frozen. Statt's individual voir dire consumes eighty-four pages of the trial transcript. (T.p. 2763-2847.) None of the three teams of defense attorneys — all with foreknowledge of Statt's background — moved to strike her for cause based upon her testimony. All three rested upon their categorical objection to depositors at ODGF-insured institutions. The trial court expressly found that Statt's "answers to the questions did not indicate any bias or prejudice." (T.p. 2849.)

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[13] The federal trial took place just weeks after defendants' convictions in this case were reported in the Cincinnati news media. A change of venue in the federal case was ordered by a visiting judge who elected to move the case to his own district in Michigan. Moreover, the federal indictment and trial proceedings are *not* part of the record in this case.

The unprincipled attack upon Juror Larry Dalton is even more outrageous, and exemplifies the evils of inviting defeated litigants to beseige jurors "in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict." *McDonald* v. *Pless*, 238 U.S. 264, 267-68 (1915); *see Tanner* v. *United States*, 483 U.S. 107 ("[s]ubstantial policy considerations support the rule against the admission of juror testimony to impeach a verdict"). As the Ohio Supreme Court held, the defendants' request to file an untimely new trial motion attacking Dalton through dubious juror affidavits was properly denied under Ohio law, and is supported by adequate state grounds. (Pet. App. B, pp. 5-9.) The rejected new trial motions are irrelevant to the venue and voir dire issues.

This case offers no venue, voir dire, or other issue worthy of review. Petitioners received every constitutional safeguard necessary to assure them a fair trial by an impartial jury. The lower courts' findings to that effect should be respected.

2. The Ohio Supreme Court Properly Applied The Harmless Error Standard To All Issues Concerning The Presentation Of Instructions To The Jury.

Petitioners' argument regarding the Ohio Supreme Court's analysis of the jury instructions is premised upon a highly misleading characterization of the facts. At the heart of petitioners' argument are two separate events. The first relates to four additional instructions delivered orally at the end of the charge, then reduced to writing and delivered to the jury the morning of the first full day of deliberations. Petitioners do not assert that these additional instructions were erroneous — indeed, they had requested three of the four. Rather, they object to the *procedure* used to get them in writing to the jury, although Warner's counsel was directly involved in that very procedure. Specifically addressing Warner's argument, the Ohio Supreme Court stated:

> We note with respect to the ex parte communications that Warner's attorneys were present when the trial judge left his chambers to order the additional instructions given to the jury. Warner does not assert, nor does the record indicate, that he objected to the trial court about this procedure or that a request was made that the jury be recalled for a formal presentation of the additional written instructions in open court.

(Pet. App. A, p. 41.)[14] Thus, as to these additional instructions, Warner's attorneys saw them in advance, assisted in their preparation and delivery, and made no objection to the procedure.

Petitioners then complain that the State's motion to correct the record to reflect delivery to the jury of the written instructions was "belated."[15] The State did not file the motion earlier because the petitioners failed to raise any issue about the additional instructions until their appellate briefs were filed fifteen months after the verdict. The correction of the record was addressed through hearings in the trial court, which factually determined that the additional instructions got to the jury. The Ohio Supreme Court upheld that finding. (Pet. App. A, p. 41.)

As to petitioner Schiebel, the Ohio Supreme Court held that "Schiebel's absence when the [written] supplemental instructions were delivered was harmless beyond a reasonable doubt." (Pet. App. B, p. 33.) The trial court had done no

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[14] As with other housekeeping matters throughout the case, it was clear to the State and the trial judge that Warner's attorneys were present for this purpose on behalf of all three defendants.

[15] Petitioners also contend that the motion was "controversial," even though it is clearly provided for in Ohio App. R. 9(E), which is identical to Fed. R. App. P. 10(e). The only "controversy" arose because Warner initially attempted to argue that his attorneys were oblivious to the additional instructions when, in fact, they were directly involved in the process.

more than supply the jury with written versions of instructions — most given at defendants' request — which had already been read to the jury in the presence of all parties and counsel. Based upon its review of the record, the Ohio Supreme Court found that Schiebel's "presence or absence would not have changed the outcome of the verdict given the substantial amount of evidence in support of conviction." (Pet. App. B, p. 33.)[16]

The second event about which petitioners complain was the trial court's decision not to supply the prosecution or defense with a copy of the written instructions prior to their submission to the jury. The Ohio Supreme Court found "no prejudice from the inability of defendants to inspect the written instructions." (Pet. App. B, p. 23.) The petitioners' effort to overcome this crucial flaw in their argument is a contention that there were five alleged minor variations between the 221 pages of written instructions and the seventy-one transcript pages of oral instructions. (T.p. 11,458-11,524, 11,535-11,539.) The Ohio Supreme Court properly characterized petitioner Warner's arguments about the alleged variations as "meritless." (Pet. App. A, p. 41.)[17] Moreover, as this Court has noted, an instruction cannot be

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[16] Throughout the Ohio Supreme Court's opinions regarding Warner and Schiebel, the unanimous court evinced a firm and coherent understanding of the harmless error standard set forth in *Chapman* v. *California*, 386 U.S. 18 (1962), and further clarified in cases such as *Rushen* v. *Spain*, 464 U.S. 114 (1983); *Rose* v. *Clark*, 478 U.S. 570 (1986); and *Carella* v. *California*, 491 U.S. 263 (1989).

[17] Two of the alleged "variations" relate to the absence of a written instruction that a "good purpose" could be a defense to the unauthorized act counts (on which only Warner was convicted), but the Ohio Supreme Court held that a good purpose or motive was *not* a defense to such charges. (Pet. App. A, p. 41 n. 19.)

Petitioners then complain about surplus wording in an introductory explanation of the unauthorized acts statute. However, in the *specific* charges on those counts, the allegedly surplus words ("warrant or other order") were not used. Petitioners also mistakenly allege that there is a difference be-

judged in artificial isolation from the remainder of the charge. *Cupp* v. *Naughton*, 414 U.S. 141, 147 (1973). That is all the more obvious in a charge of this length.

Ohio's highest court having found that there were no meaningful variations between the oral and written instructions, the petitioners have no valid basis upon which to invoke federal review.

3. A Defendant Who Is Advised By The Court Prior To Trial That The Offense For Which He Was Indicted Does Not Require Proof Of Specific Intent And Who Is Neither Misled Nor Prejudiced Does Not Raise Any Due Process Issue.

Warner asserts that the Ohio Supreme Court in *State* v. *Keith*, 91 Ohio St. 132, 110 N.E. 188 (1914) and *Peskind* v. *State*, 115 Ohio St. 279, 152 N.E. 670 (1926) had long ago interpreted the unauthorized acts offense to require proof of an intent to injure or defraud, despite the fact that such an intent did not appear in the language of the offense. Ohio Rev. Code § 1153.01. This faulty rendition of state law — upon which Warner's due process claim under *Marks* v. *United States*, 430 U.S. 188 (1977), and *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964), depends — was rejected by Ohio's Supreme Court and Court of Appeals.[18] Thus, Warner was neither convicted of a crime "not enumerated in the statute"

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tween the statutory definition of reckless in the transcript (T.p. 11,480) and that in the written instructions (T.d. 415 at 13, 28), but there is no actual variation. The standard is properly articulated in each place.

Finally, referring to one preliminary written instruction describing the "due diligence" requirement of Ohio's securities laws, petitioners argue that the court somehow shifted the burden of proof. Petitioners take the statutory definition totally out of context and ignore the trial court's clear instructions that the State was required to prove all elements of such offenses beyond a reasonable doubt. (T.p. 11,500; T.d. 415 at 3, 197-203.)

[18] The court of appeals found "that the cases cited by Warner in support of his contention that intent to injure or defraud as a judicially-imposed ele-

at the time of his conduct, *Bouie*, 378 U.S. at 363, nor was he confronted with a retroactive application of an unforeseeable judicial enlargement of the unauthorized acts offense, *Marks*, 430 U.S. at 192.[19] Contrary to Warner's assertion, the trial court's recklessness instruction and the reviewing courts' affirmance of this instruction were not a "marked departure" from prior state law, but were consistent with the Ohio default statute imposing recklessness as the mens rea where a criminal statute "neither specifies culpability nor plainly indicates a purpose to impose strict liability." Ohio Rev. Code § 2901.21(B); *see also Osborne* v. *Ohio*, ____ U.S. ____, 110 S. Ct. 1691, 1698 n. 9 (1990) (applying Ohio Rev. Code § 2901.21(B) to criminal statute silent on mental state).[20]

Nor does Warner have any due process claim under *Jackson* v. *Virginia*, 443 U.S. 307 (1979), or *DeJonge* v. *Oregon*, 299 U.S. 353 (1937). The trial judge did not, as Warner asserts, either "manipulate" or "switch" the mens rea charge with respect to the unauthorized acts. Before the trial commenced,

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ment have no application to the portion of R.C. § 1153.01 describing unauthorized acts. *See Peskind* v. *State* (1926), 115 Ohio St. 279, 152 N.E. 670; *State* v. *Keith* (1914), 91 Ohio St. 132, 110 N.E. 188." (Pet. App. C, p. 32.)

[19] Moreover, the state law construction of the unauthorized acts offense involved in this case does not threaten any constitutionally protected rights. *See, e.g., Marks*, 430 U.S. at 197 (expression); *Colautti* v. *Franklin*, 439 U.S. 379 (1979) (privacy).

[20] Not all federal courts have read an "intent to injure or defraud" into the federal unauthorized acts offense, as Warner contends. *See, e.g., Harrison* v. *United States*, 279 F.2d 19 (5th Cir. 1960). Even under the federal misapplication statute, the mental element may be satisfied by a showing of recklessness. *United States* v. *Woods*, 877 F.2d 477 (6th Cir. 1989); *United States* v. *Cyr*, 712 F.2d 729 (1st Cir. 1983). More relevant to this case, however, is the fact that other states beside Ohio have refused to read an "intent to injure or defraud" into their unauthorized acts or misapplication offenses where such an intent did not appear in the statute. *Commonwealth* v. *Nichols*, 257 Mass. 289, 153 N.E. 787 (1926); *People* v. *Marcus*, 261 N.Y. 268, 185 N.E. 97 (1933).

the judge made it clear that under Ohio law an intent to injure or defraud was not an element of the unauthorized acts offense and likewise expressed his reluctance to add a mens rea that was not contained in the statute as an element of the crime. Warner did object to the recklessness charge as a matter of Ohio law, but he did not — and could not legitimately — claim that he was surprised, prejudiced or otherwise taken unawares by this charge.[21]

Finally, there was more than sufficient evidence from which the jury could have concluded beyond a reasonable doubt that Warner was aware of the board of directors resolution limiting Home State's collateralization rate with ESM. Warner received copies of the board reports, attended board meetings, and was fully briefed by Home State's officers regarding the extent of Home State's excessive collateralization of its transactions with ESM. Indeed, as the Ohio Supreme Court noted after reviewing the entire record, "Warner was involved in almost every facet of the internal operations of the bank," and "he was kept informed of all policy decisions of the Board." (Pet. App. A, p. 40.) It is

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[21] In this respect, Warner's reliance on *Watson* v. *Jago*, 558 F.2d 330 (6th Cir. 1977), is erroneous. In *Watson*, the issue was "whether under the facts of this case, felony-murder was effectively added to the charges against which appellant had to defend." 558 F.2d at 335. The court found that the addition of a felony-murder charge at the time of opening statements clearly constituted an impermissible amendment of the indictment under state law. This state law error became the predicate for federal relief under the due process clause because the amendment added an independent basis for conviction for which defendant was not given any notice prior to trial. In contrast to *Watson*, no impermissible amendment of the indictment occurred here, nor was the indictment defective under state or federal law for misstating the appropriate mens rea. *State* v. *O'Brien*, 30 Ohio St. 3d 122, 508 N.E.2d 144 (1987); *United States* v. *Haas*, 583 F.2d 216 (5th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979). As the Ohio Supreme Court noted below, it is not necessary "to set forth a specific degree of culpability in an indictment where the statute fails to do so and it can readily be gleaned by reference to other statutes or case law." (Pet. App. A, p. 49.)

Warner's spurious disavowal of knowledge — not the State's evidence — that "falls short" in this case.

4. A State May Define The Mental Element Of A Securities Offense In Terms Of Due Diligence Without Violating The Due Process Clause.

For purposes of its criminal securities offenses, Ohio has chosen to define the mental element of knowledge in terms of due diligence:

> In any prosecution brought under §§ 1707.01 to 1707.45 of the Revised Code, . . . the accused shall be deemed to have had knowledge of any matter of fact, wherein the exercise of reasonable diligence, he should, prior to the alleged commission of the offense in question, have secured such knowledge.

Ohio Rev. Code § 1707.29. The Ohio legislature specifically intended this definition of knowledge to be used exclusively in prosecutions for the securities offenses set forth in Chapter 1707 of the Ohio Rev. Code, including Ohio Rev. Code §§ 1707.44(B), (G) and (J), of which petitioners stand convicted.

The Ohio legislature's decision to impose criminal liability for these securities offenses based upon a due diligence standard presents no federal constitutional issue. "There is wide latitude in lawmakers to declare an offense and to exclude elements of knowledge and diligence from its definition." *Lambert* v. *California*, 355 U.S. 225, 228 (1957). This is particularly true of regulatory statutes enacted to achieve legitimate social ends pursuant to a state's police powers. *United States* v. *Freed*, 401 U.S. 601, 609 (1971); *United States* v. *Balint*, 258 U.S. 250, 252 (1921). In short, there is no question that Ohio Rev. Code § 1707.29 is a constitutional exercise of Ohio's police powers.

Petitioners seek to avoid this truth by mischaracterizing Ohio Rev. Code § 1707.29 as a mandatory irrebuttable pre-

sumption that relieved the prosecution of its burden of proof on an essential element of the offense in violation of the Due Process Clause. *See Sandstrom* v. *Montana*, 442 U.S. 510 (1979). In support of this proposition, petitioners call attention to the label ("Presumption of Knowledge") affixed to Ohio Rev. Code § 1707.29 by the codifiers. The title, chapter and section headings of the Revised Code, however, do not constitute any part of Ohio law. Ohio Rev. Code § 1.01. In interpreting Ohio law, a "resort to a title is unnecessary and improper under Revised Code Section 1.01." *State* v. *Beener*, 54 Ohio App. 2d 14, 16, 374 N.E.2d 435, 436 (1977).

Every Ohio court to have considered Ohio Rev. Code § 1707.29 has declared the statute to be the definition of knowledge for purposes of the security law offenses contained in Title 17 of the Revised Code and *not* an impermissible presumption. *State* v. *Trivedi*, 8 Ohio App. 3d 412, 457 N.E.2d 868 (1982); *State* v. *Walsh*, 66 Ohio App. 2d 85, 420 N.E.2d 1013 (1979). The Ohio Supreme Court has interpreted "the legislative intent of R.C. 1707.29 to, in effect, define the knowledge requirement for certain violations of Ohio's Securities Act, R.C. Chapter 1707. Thus, instead of creating a presumption as alleged by [petitioners], R.C. 1707.29 merely sets forth what the term knowledge encompasses for purposes of criminal liability under R.C. Ch. 1707." (Pet. App. A, p. 38.)

Ignoring the Ohio Supreme Court's interpretation, petitioners' assert that Ohio Rev. Code § 1707.29 is a presumption in aid of the definition of knowledge contained in Ohio Rev. Code § 2901.21(A)(2). This contention ignores the fact that the definition of knowledge contained in Title 29 of the Revised Code is inapplicable to prosecutions for securities violations, for which the Ohio Legislature created the special definition of knowledge set forth in Ohio Rev. Code § 1707.29. Neither the legislative history nor the case law suggests that knowledge of the type defined in Title 29 of the Revised Code is a required element of the securities offenses contained in Title 17 of the Revised Code.

While it may be true that a federal court cannot sustain an unconstitutional presumption on the ground that the legislature *might* have made it a crime to commit the basic act set forth in the presumption, *see Leary* v. *United States*, 395 U.S. 6, 37 (1969); *Tot* v. *United States*, 319 U.S. 463, 472 (1943), the legislature in Ohio *has* in fact made it a crime to commit a securities offense based upon a due diligence standard.[22] The definition of knowledge contained in Ohio Rev. Code § 1707.29 is thus clearly distinguishable from the statutory presumptions at issue in *Sandstrom* v. *Montana*, 442 U.S. 510 (1979), *Francis* v. *Franklin*, 471 U.S. 307 (1985) and *Carella* v. *California*, 491 U.S. 263 (1989). For instance, in *Sandstrom* and *Franklin* once the prosecution proved the predicate fact that the defendant killed the victim, the defendant was presumed to have done so intentionally. In *Carella*, once the prosecution proved that the defendant had failed to return the rental car within a specified number of days, the defendant was presumed to have intentionally withheld the vehicle. Unlike the foregoing cases, even after the prosecution proved the predicate fact that petitioners made false representations in selling securities, the prosecution still had to prove that the defendants in the exercise of reasonable diligence should have known of the falsity of these representations at the time the offenses were committed.

It is self-evident that a state may criminalize the making of misrepresentations in connection with the sale of worthless securities based upon a due diligence standard. Ohio's statute doing so does not raise any constitutional question worthy of review.

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[22] This fact distinguishes cases such as *Carella* v. *California*, 491 U.S. 263 (1989). The predicate facts that served as the bases for the presumptions in *Carella* had not been declared criminal, although the California legislature certainly could have done so without running afoul of the Constitution. Since the defendant in *Carella* was charged with grand theft, proof of the predicate facts alone could not constitute proof of the crime without the benefit of the illegal presumptions.

5. Even If The Definition Of Knowledge Contained In Ohio Rev. Code § 1707.29 Were Viewed As A Presumption, The Ohio Supreme Court Has Found That Any Such Error Would Be Harmless Beyond A Reasonable Doubt.

Petitioners contend that review should be granted to resolve the "tension" between the harmless error analysis pertaining to presumptions described in *Rose* v. *Clark*, 478 U.S. 520 (1986), and the approach described in Justice Scalia's concurrence in *Carella* v. *California*. Whether there is such a "tension" between *Rose* and *Carella*, as petitioners assert, is irrelevant. Petitioners were charged with three separate offenses under Ohio Rev. Code §§ 1707.44(B)(4), (G) and (J). Section 1707.44(J) required the jury to find that petitioners acted both "knowingly" (as defined by Ohio Rev. Code § 1707.29) and *with purpose to deceive*. Since the jury convicted both petitioners under § 1707.44(J) — which required a finding of a purpose to deceive — the jury necessarily found that the petitioners had actual knowledge of the falsity of the representations made to the debenture purchasers. The Ohio Supreme Court in addressing Warner's argument in this respect observed that "Warner's actions were shown to be calculated and deceitful." (Pet. App. A., p. 40.) As the Ohio Supreme Court held, any error in the instructions was "harmless beyond a reasonable doubt because the predicate facts conclusively established knowledge on the part of [petitioners], so that no rational juror could find that [petitioners] made the misrepresentations without the knowledge required by R.C. § 1707.44." (Pet. App. A, p. 40; *see also* Pet. App. B, p. 33.)

The petitioners cannot validly argue that the granting of certiorari in *Yates* v. *Evatt*, No. 89-7691, supports certiorari here. In a prior review of *Yates* this Court had already determined that an instruction that permitted the jury to presume malice from defendant's use of a deadly weapon constituted error under *Francis* v. *Franklin*, 471 U.S. 307 (1985). Unlike

the record before the state court in *Yates*, the jury in this case made a specific finding of intent to deceive on the part of both Warner and Schiebel. This finding necessarily included a finding that Warner and Schiebel actually knew that the representations they were making were false. Thus, on the facts of this case, any conceivable constitutional infirmity in the jury instructions given pursuant to Ohio Rev. Code § 1707.29 would be harmless beyond a reasonable doubt under both *Rose* v. *Clark* and *Carella* v. *California*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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